

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:) Bankr. No. 01-41133
) Chapter 7
TAMARA JO JOHNSON)
a/k/a Tammy J. Johnson) DECISION RE: MOTION
Soc. Sec. No. 503-96-3517) TO DISMISS FOR
) SUBSTANTIAL ABUSE
Debtor.)

The matter before the Court is the Motion to Dismiss for Substantial Abuse filed by the United States Trustee and the response filed by Debtor. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's final findings of fact and conclusions of law under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the Motion shall be granted.

I.

Upon the United States Trustee's earlier Motion for Summary Judgment, the Court entered an interim decision and found that Chapter 7 debtor Tamara J. Johnson ("Debtor") is a young widow with two minor-age sons. She is employed as a radiology technologist at an area hospital. She also receives survivor benefits each month from the State of South Dakota's retirement system and she receives Social Security funds each month on her children's behalf.

Debtor scheduled general, unsecured claims totaling \$166,317.41. Many were for medical expenses incurred during her husband's illness; others arose from credit card charges. Debtor acknowledged in her schedules that some of the medical expenses may yet be paid by insurance. She had also listed a student loan

creditor as a priority creditor for \$14,000, but provided no statutory basis for that priority. Debtor has already reaffirmed her home mortgage debt.

Though the record at that time showed that Debtor had disposable income to fund a Chapter 13 plan, the Court did not grant the United States Trustee's motion for summary judgment because it wanted to received evidence on two matters. The Court stated:

In a disposable income calculation under § 707(b), the law is clear that if a debtor is going to include his or her children's expenses in the household expenses, then benefits intended to pay for the children's expenses must also be included. Stated another way, a debtor may exclude children's benefits from a disposable income calculation only if the children's expenses are also excluded. The Court does not have before it that portion of Debtor's household expenses that are attributable to her sons. That is, the record does not establish what portion of Debtor's expenses for food, clothing, utilities, etc., are for her sons' benefit. Only with that information can the Court apply § 707(b) without also factoring in the Social Security benefits that Debtor receives on her sons' behalf.

The United States Trustee's Motion for Judgment on the Pleadings will be denied so that Debtor may establish her sons' share of the household expenses at an evidentiary hearing. The Court cautions Debtor, however, that her testimony alone may not be sufficient. Her testimony should be supported by the family's actual financial records for expenses and other reliable evidence.

The present record is also not sufficient regarding the total amount of unsecured claims against Debtor. Her schedules indicated that some medical bills may yet be paid by insurance. Debtor and her attorney need to work with Debtor's insurance company(ies) to reassess all claims as scheduled to insure that each is correct.

Debtor will then need to file an amendment to the schedules as may be necessary. Over five months have elapsed since this case was filed, so more accurate claims records should now be available. Only when the total amount of unsecured claims are better known can the Court accurately assess Debtor's ability to repay them through any disposable income she may have.

An evidentiary hearing was held to address the two shortcomings in the record that the Court had identified. Both parties' exhibits were received by stipulation.

Certified Public Accountant Craig Bumann, an analyst with the United States Trustee's office, presented an exhibit he had prepared based on Debtor's original Schedules I and J.¹ On the exhibit he had assessed Debtor's \$200 per month clothing expense and, based in part on I.R.S. standards, he opined that \$100 was more reasonable. Bumann also assessed that Debtor's budgeted expense of \$450 per month for recreation was too high and he stated that \$150 was more reasonable. Finally, Bumann removed the expense for Debtor's student loan since it would be paid with other unsecured debts through a Chapter 13 plan, and he removed Debtor's expense for cigarettes as unnecessary. Based on Debtor's reported income from her job, retirement system payments, and the children's Social Security benefits, and the expenses as he had adjusted them, Bumann calculated that Debtor had monthly income in excess of expenses of \$769.38.

¹ Debtor filed amendments to her Schedules I and J the day of the evidentiary hearing, which were not reflected in the United States Trustee's Exhibit 1.

Debtor testified that she has been a widow since September 1, 2001, when her husband died after a long battle with cancer. She said she only started being involved in the family's finances after her husband passed away. Debtor stated that her two sons, ages 13 and 8, were unable to participate in after-school activities during the four years that their father was ill due to budget constraints. She said she now tries not to deny them anything because of these past denials, and she tries to keep them busy to help them deal with their grief. This, she stated, accounts for her \$450 monthly budget for recreation, which covers her sons' several after-school sports activities, travel and meals out related to these activities, and a few pool-playing outings for herself a month. Debtor also testified that her youngest son goes through several pairs of shoes and that each son recently needed a new suit. She said she buys clothing at store sales and rummage sales. Debtor says she smokes a pack of cigarettes a day and that she has been unable to quit due to stress. She did not find any of her expenses to be unreasonable and, based on her calculations, she has only \$58.05 in disposable income at the end of each month.

On cross-examination, Debtor testified each of her sons receives \$827 per month in Social Security benefits. She deposits \$500 from each check into the household account and she uses the balance, which is kept in separate accounts for each child, to pay some of the children's expenses, including medical insurance co-

payments. On redirect, she stated that it is unclear what the total unpaid medical bills are remaining from her husband's illness.

At the conclusion of the evidence, the Court again noted that the record was not sufficient to establish how much unsecured debt Debtor owed on the petition date. The Court directed Debtor to make a concerted effort to determine that figure so that an accurate § 707(b) analysis could be made by the Court.

In closings, the United States Trustee accepted Debtor's explanation for her monthly clothing expenses. He still challenged, however, Debtor's recreational expense and cigarette expense. He also noted that both Debtor's attorney fee expense and student loan expense would be paid with other unsecured claims through a Chapter 13 plan. Finally, he noted that the evidence at the hearing indicated that Debtor's household had another \$654 per month in income from her sons' Social Security benefits that had not been previously disclosed.

In her closing, Debtor argued that the presumption under § 707(b) goes with the Debtor. She stated that her amended Schedules I and J, as filed that day, reflected what Debtor actually spends. She also argued that applying only \$500 of each child's Social Security benefits to the household income was reasonable.

Debtor later supplemented the record, as the Court had

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requested, to more accurately set forth the unsecured claims against her. She stated that her counsel's investigation and communications with creditors indicated that Debtor presently owed \$47,347.95 in unsecured debt (all of which were medical expenses or credit card bills). However, Debtor had not yet been able to get an accurate bill from the Mayo Clinic. Instead, the Clinic had advised her that the bill had been "charged off." Eventually, the Court set a deadline for Debtor to supplement the record regarding Mayo Clinic's bill. Nothing more was received and the matter was taken under advisement.

II.

The statutory and case law set forth in the Court's March 22, 2002, Decision regarding the United States Trustee's motion for summary judgment is incorporated herein.

III.

Based on Debtor's amended Schedule I and her testimony at the hearing, Debtor's household has monthly income of \$3,414. This includes take-home pay of \$1,032.05, the state pension fund payment of \$728, and Social Security benefits to her children of \$827 each. Based on Debtor's amended Schedule J, the family's monthly expenses total \$2,702. Thus, Debtor's household has income in excess of expenses of \$712 per month. If the two expenses that would be paid through a Chapter 13 plan are removed (attorney's fees of \$25 and the student loan payment of \$153), Debtor would have a total of

\$890 per month to fund a Chapter 13 plan.²

The present record also shows that total unsecured claims in this case, once all proofs of claim have been filed, should not exceed \$61,347.95 (\$47,347.95 for credit cards and medical bills and \$14,000 for student loan), and should be substantially less, assuming Mayo Clinic's present bill is now less than it was on the petition date based on some subsequent insurance payments or other credits.³ Thus, with disposable income of \$890, Debtor can pay about 47% of her unsecured claims over a three-year plan and about 79% of the unsecured claims over a five-year plan.⁴ Since a 47% payout to unsecured creditors would result in a meaningful return

² Though in its interim decision the Court had advised Debtor that she could present her income and expenses separately from her children's, Debtor did not do so at the evidentiary hearing. Further, the United States Trustee's segregation of income and expenses in his Exhibit 1 was incomplete because it did not reflect Debtor's testimony later in the hearing that each son actually receives \$827 in monthly Social Security benefits and that Debtor only included \$500 for each in her amended Schedule I. The United States Trustee's Exhibit 1 also did not reflect Debtor's testimony that the \$300 that Debtor retains in separate accounts for each son from the Social Security payments is sometimes used for that son's expenses. For these reasons, the Court calculated Debtor's disposable income based on her entire household's income (based on the evidence presented at the hearing) and the entire household's expenses (as reported on Debtor's amended Schedule J, with the cigarette, attorneys' fees, and student loan expenses removed).

³ Presumably from insurance payments and other post-petition creditors to the account, Debtor's largest unsecured medical claim decreased by 88% between the petition date and ten months later when Debtor supplemented the record for the § 707(b) hearing.

⁴ In these calculations, the Court has included a 10% surcharge on the unsecured claims to pay the Chapter 13 trustee's fees.

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to them through a Chapter 13 plan, Debtor's Chapter 7 case will be dismissed for substantial abuse under § 707(b).

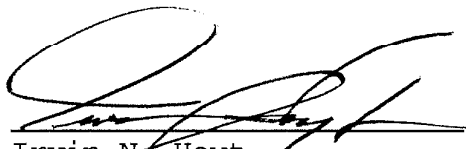
Debtor will be given ten days to voluntarily convert her Chapter 7 case to a Chapter 13 case. If it is not converted timely, the case will be dismissed upon the Assistant United States Trustee's affidavit of default.

At this time, the Court takes no position on whether Debtor's monthly recreational expense of \$450 or her \$101.70 cigarette allowance are reasonable. If Debtor converts her case to Chapter 13, that issue can be decided under a good faith analysis pursuant to 11 U.S.C. § 1325(a)(3).

An appropriate order will be entered.

Dated this 8 day of January, 2003.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 

Deputy Clerk



I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

JAN 10 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By MN

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

JAN 10 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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